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No. 91-872

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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Respondent asserts that we have "misstated 'fact' and 'law,'" (Br. in Opp. 1), that we "[m]isread[] the plain text of Federal Rule of Evidence 804" (*ibid.*), that we "[m]isrepresent[] the views of a distinct minority of Second Circuit judges," (*ibid.*), that our contentions concerning the failure to develop the testimony of Bruno and DeMatteis are "factually specious" and "nonsense" (*id.* at 8, 9), that our argument is "trivial" (*id.* at 12), and that our suggestion that the court of appeals' departure from the clear terms of Rule 804(b)(1) warrants consideration of summary reversal constitutes "a studied insult to the deliberative process" (Br. in Opp. 21). Aside from those derogatory characterizations, however, respondent conspicuously fails to defend the court of appeals'

holding that the "similar motive" requirement of Federal Rule of Evidence 804(b)(1) is "irrelevant" when the declarant is unavailable by virtue of his invocation of his Fifth Amendment privilege against compulsory self-incrimination. Rather than support the court of appeals' decision to read the "similar motive" requirement out of Rule 804(b)(1) under such circumstances, respondent simply argues that the government had such a motive in this case, and then contends that the decision of the court of appeals does not present a circuit conflict or a basis for summary reversal.

1. Respondent argues that, because the government had an "opportunity" to examine Bruno and DeMatteis in the grand jury, that requirement of Rule 804(b)(1) was satisfied. Br. in Opp. 8-12. At no point, however, have we suggested anything to the contrary. Our claim in the district court, the court of appeals, and this Court has consistently been that the government lacked a "similar motive" to examine the two witnesses in the grand jury, and that their grand jury testimony therefore should not have been held admissible under Rule 804(b)(1).[1]

[1] Respondent reads *California* v. *Green*, 399 U.S. 149 (1970), to suggest that the inquiry under Fed. R. Evid. 804(b)(1) should be limited to whether the opponent of the testimony had the "opportunity" to examine the declarant at the prior proceeding. See Br. in Opp. 10. *Green*, however, addressed the Confrontation Clause rights of a defendant against whom prior testimony had been offered, not the evidentiary rules governing the admissibility of such testimony. Although, as respondent contends, there is "no constitutional objection to applying rules like [Rule] 804(b)(1) to admit at an accused's trial testimony taken at a preliminary examination," Br. in Opp. 10, that fact does not bear on the question presented here: whether the rules of evidence *require* the admission of such testimony, where the opponent had the opportunity, but not the motive, to develop it when it was originally given.

Addressing the question whether the government had a "similar motive" to develop the testimony of Bruno and DeMatteis before the grand jury, respondent suggests that, because the "issues" in the grand jury were the same as those at trial in this case, the government's motive to develop their testimony before the grand jury was "similar" to its motive to impeach that testimony at trial. Br. in Opp. 12-15. That claim finds no support in the record, or in the court of appeals' decision, which explicitly stated: "[W]e agree that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis." Pet. App. 19a. When Bruno and DeMatteis testified before the grand jury, the need to pursue, and maintain the security of, the grand jury's on-going investigation was the critical concern that underlay the government's decision to allow them to testify without serious challenge. That concern would have had little impact on the government's motive to cross-examine Bruno and DeMatteis had they testified at trial. The district court satisfied itself that the government's motives in the grand jury were not "similar" to those at trial (Pet. App. 51a), and respondent offers no reason to question that finding.[2]

[2] Respondent appears to believe it to be of substantial importance that, under the Federal Rules of Evidence, "[t]he old common law rule * * * that former testimony could be offered only against a party to the prior proceeding * * * was * * * expanded to permit introduction against those 'in privity' with the party-opponent." Br. in Opp. 13. We have never disputed respondent's claim that the government was

2. The court of appeals' conclusion that the grand jury testimony of Bruno and DeMatteis was admissible at trial under Rule 804(b)(1) rested not on any finding of "similar motive," but on the rationale that the requirements of Rule 804(b)(1) were "irrelevant" because the government, through its power to immunize, could have made the two witnesses available at trial. Pet. App. 24a. Other than to protest that "[n]othing in the Court of Appeals' opinion compels an immunity grant" (Br. in Opp. 17), however, respondent does not even attempt to defend that rationale. Nor does he persuasively explain why the court's decision is not in conflict with cases from other circuits, which have declined to use the government's immunity power as a basis for disregarding its lack of motive to cross-examine a declarant whose prior testimony has been proffered under Rule 804(b)(1). See Pet. 15-17 (citing cases). While respondent would distinguish such cases from the Third, Seventh, and Fifth Circuits by noting that the prior proceedings in those cases involved "different issues" (Br. in Opp. 19-20), at no point in its opinion did the court of appeals here ground its decision on any similarity

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a party to the grand jury proceedings; the dispute in this case involves only the "similar motive" prong of Rule 804(b)(1). We note, however, that respondent's statement concerning identity of parties under Rule 804(b)(1) is misleading. The Federal Rules relax the requirement that the opponent of the testimony have been a party to the prior proceeding *only in civil cases*. See Fed. R. Evid. 804(b)(1) (former testimony not excluded "if the party against whom the testimony is now offered, *or, in a civil action or proceeding, a predecessor in interest*, had an opportunity and similar motive to develop the testimony") (emphasis added). This case does not arise out of a civil proceeding.

between the issues in the grand jury and those presented at trial. Similarly, respondent is simply wrong to claim that "[t]he cases cited in the petition, at 17, are, broadly speaking, based on the same rationale as the Court of Appeals' decision here" (Br. in Opp. 20). None of the cited cases, which concerned the admissibility of prior grand jury testimony against the government under Rule 804(b)(1), based its conclusion on the government's ability to make the declarant available through a grant of immunity.

3. Respondent accuses the government of "trying to turn the clock back to rigid and technical rules that prevent a jury from hearing reliable evidence on the merits." Br. in Opp. 21.[3] As our petition makes

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[3] Similarly, respondent asserts that "the sort of drastic limitation proposed by the government will have a decisive impact on civil, as well as criminal, cases in which former testimony is routinely admitted." Br. in Opp. 6. The only limitation for which we have argued is the limitation embodied in the text of Rule 804(b)(1)—that the party against whom the testimony is offered have had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Respondent advances no reason to believe that adherence to the terms of Rule 804(b)(1) would alter current practice in civil or criminal cases in the federal courts.

Respondent asserts that "Rule 804(b)(1) and this Court's cases say" that testimony at a preliminary hearing will "probably come in" at trial against a defendant. Br. in Opp. 11. We are unaware of any authority bearing on the question of how often preliminary hearing testimony is admitted or excluded when offered at trial against a defendant. In any event, however, the legal principles governing admission of such testimony against a defendant are identical to those governing admission of any former testimony against any party, including the government. If the opposing party had an opportunity and motive to develop the testimony in the prior proceeding—and if the testimony meets the other re-

clear, we seek only to enforce the terms of an evidentiary rule that demands a fact-sensitive inquiry into "motive" and "opportunity," and to overturn a decision that pretermits that inquiry, in disregard of the unique concerns of a prosecutor who places a hostile witness in the grand jury.[4]

Respondent also refers to "the government's proposed double unavailability principle." Br. in Opp. 17. We have proposed no such principle; a declarant is unavailable if he meets the criteria stated in Rule 804(a), among which is "exemp[tion] by ruling of the court on the ground of privilege." Fed. R. Evid. 804(a)(1). We have never disputed that Bruno and DeMatteis were unavailable at trial under that definition. Our quarrel with the court of appeals centers on the court's conclusion that, having determined that the declarants were "unavailable" in the above sense, the court felt that their "availability" to the government, the opponent of the testimony, by virtue of a

quirements of Rule 804(b)(1)—it is admissible; otherwise, it is not. It is the court of appeals that has departed from that principle by requiring a showing of similar motive when former testimony is offered against a defendant, but omitting that requirement when the declarant invokes his Fifth Amendment privilege and the testimony is offered against the government.

[4] While respondent suggests that the government's notification to defendants, pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), that Bruno and DeMatteis might have exculpatory material constituted a concession that "these two men might have information a jury should consider" (Br. in Opp. 4), the government's notification did not in any way suggest a readiness to waive any evidentiary objection to the admission of such information, nor did it constitute an admission that any testimony given by Bruno and DeMatteis was or would be truthful.

grant of immunity somehow rendered inapplicable the specific requirements of Rule 804(b)(1) governing admissibility of former testimony.

Respectfully submitted.

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